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## **Submission to NI Affairs Committee inquiry on HM Government support for UK Victims of IRA attacks that used Gaddafi-supplied Semtex and weapons.**

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# **Written Evidence submitted by Human Rights Centre at Queen's University Belfast for the Northern Ireland Affairs Committee's inquiry into HM Government support for UK Victims of IRA attacks that used Gaddafi-supplied Semtex and weapons (LSX0013)**

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## **Summary**

1. This submission considers the current state of international law concerning State liability for third party actors, but also addresses other ways in which States can demonstrate their remorse for actions that led to deaths in other countries. It concludes that, while international law may not yet be sophisticated enough to ensure that States are held liable for third party actions even when certain conditions are fulfilled, there are other measures which can be negotiated with States to ensure that their moral culpability for such actions is demonstrated in visible ways.

## **International law**

2. To establish a State's obligation to provide reparations under international law it must first be proved that the State committed an internationally wrongful act, i.e. a breach of a treaty into which it had entered or a breach of international customary law. Unfortunately, it is not clear that Libya breached any such international obligation by supplying weapons to the IRA. It is unlikely that the rules set down by international humanitarian law for internal armed conflicts can be said to apply to the conflict in Northern Ireland, as the United Kingdom government did not ratify the relevant international treaty until 1998.<sup>1</sup> It is also unlikely that the IRA's attacks would satisfy the special intent required for the international crime of genocide, as this requires evidence that the IRA intended 'to destroy, in whole or in part, a national, ethnical, racial or religious group'.<sup>2</sup> International customary law outlaws also crimes against humanity, but again this requires the crimes to have been 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.<sup>3</sup> In addition, it would need to be shown that Libya or its agents were knowingly responsible for such crimes.
3. The basic premise in international law is that States are not responsible for the acts of private actors, persons or entities, unless these acts can be attributed to the State.<sup>4</sup> Even if there was an unlawful act committed by Libya in this case, there would be difficulties in attributing responsibility to the Libyan State for attacks

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\* This submission was prepared by Dr Luke Moffett and Professor Brice Dickson.

<sup>1</sup> 1977 Additional Protocol II to the Geneva Conventions of 1949.

<sup>2</sup> Article 6, 1998 Rome Statute of the International Criminal Court, in UK the International Criminal Court Act 2001.

<sup>3</sup> Ibid, Article 7.

<sup>4</sup> Article 2, Articles on Responsibility of States for Internationally Wrongful Acts 2001.

subsequently perpetrated by the IRA. Under the Articles of Responsibility of States for Internationally Wrongful Acts 2001, a document adopted by the International Law Commission after decades of discussion and consultation,<sup>5</sup> responsibility can be attributed to a State only where one of its organs or entities has committed, through an act or omission, a wrongful act.<sup>6</sup> The difficulty here is that the IRA is and never was an organ or entity of the Libyan State.

#### Attribution of responsibility

4. There are two ways in which the Libyan state may be held responsible under international law for supplying weapons to be used in IRA attacks – through direct liability or through indirect liability.
5. As regards direct liability, responsibility could be attributed to the Libyan government if it had ‘effective control’ over a non-state actor such as the IRA.<sup>7</sup> When the United States provided training, intelligence, logistical support and weapons to the contras in Nicaragua, as well selecting targets and planning the whole operation, this violated the principle of non-intervention in international law, but the International Court of Justice held the US State not responsible for breaches of international humanitarian law committed by the Contras.<sup>8</sup> The Court found that there was insufficient evidence to suggest that there was ‘so much dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.’<sup>9</sup> In the more recent case of *Bosnia v Serbia*, involving the Srebrenica genocide, the International Court of Justice clarified that the responsibility of persons, groups of persons or entities may, for purposes of international responsibility, be attributed to State organs even if that responsibility does not follow from internal law, provided that in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond the legal status of the persons, groups or entities in order to grasp the reality of the relationship between the persons taking action and the State to which they are so closely attached as to appear to be nothing more than the State’s agent.<sup>10</sup>
6. Applying these rulings to the situation of weapons supplied by the Libyan government under Gaddafi to the IRA, the supply of weapons is unlikely to satisfy the requirements of the IRA’s ‘effective control’ by or ‘complete dependence’ on the Gaddafi regime. Thus under these rules the Gaddafi regime is not responsible for IRA attacks. Of course, if responsibility could be established through other

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<sup>5</sup> The International Law Commission was set up by the UN General Assembly in 1947.

<sup>6</sup> Articles 1-5, Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>7</sup> *Nicaragua v US (Contras case)*, (Merits) ICJ Reports 14 1986, para.115.

<sup>8</sup> *Ibid.* para.116.

<sup>9</sup> *Ibid.* para.109.

<sup>10</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p.43, para.392.

means, the new government, which overthrew the Gaddafi regime in Libya, would still be responsible under international law for the acts of the former Gaddafi regime.<sup>11</sup>

7. Alternatively, the Libyan State could acknowledge and adopt the IRA's conduct as its own, thereby voluntarily accepting responsibility and requiring it to provide reparations.<sup>12</sup> This reflects the fact that reparations and responsibility can be agreed through political and diplomatic negotiations. This was made clear in the case of the Lockerbie bombing, where Gaddafi agreed to pay \$2.7 billion to the 270 victims of the bombing of Pan Am Flight 103. This was later clarified under the US-Libyan Claims Settlement, which established a humanitarian settlement fund to settle claims for Pan Am Flight 103 as well as for other incidents, and terminated all domestic civil proceedings against the Libyan government in relation to the Lockerbie bombing.<sup>13</sup> Not all the victims of that bombing were happy with this outcome, believing that such money was a 'bribe' for foregoing truth and justice.<sup>14</sup> In the case of victims of IRA attacks, there has never been any comparable settlement. There have been reports of a 'Statement of Reconciliation to the Victims of Gaddafi-sponsored Terrorism' agreed between Jason McCue and the National Transitional Council, but no further details appear to be available at present.<sup>15</sup>
8. As regards indirect liability, States can be held responsible for complicity if they provide aid or assistance to another State in the commission of an internationally wrongful act.<sup>16</sup> Although these rules apply only between States, it could be argued that the aiding and abetting of individual crimes by senior members of the Gaddafi regime allows responsibility to be attributed to the Libyan state.<sup>17</sup> Former President of Liberia Charles Taylor was found responsible for aiding and abetting the conflict in Sierra Leone through trafficking weapons in exchange for

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<sup>11</sup> Article 10, Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>12</sup> Article 11, Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>13</sup> Claims Settlement Agreement between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya of 14 August 2008.

<sup>14</sup> Deborah R. Hensler, 'Money Talks: Searching for Justice through Compensation for Personal Injury and Death' (2003) 53 *DePaul Law Review* 417, 431.

<sup>15</sup> 'IRA victims pursue Libya compensation', *Belfast Telegraph* <http://www.belfasttelegraph.co.uk/news/northern-ireland/ira-victims-pursue-libya-compensation-28649872.html>. See too 'Libyan opposition signs IRA compensation agreement', ExaroNews, <http://www.exaronews.com/articles/4040/libyan-opposition-signs-ira-compensation-agreement>.

<sup>16</sup> Article 16, Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>17</sup> *Ntakirutinuma & Ntakitimana*, Judgment (ICTR-96-10-A & IT-96-17-A), Appeals Chamber, 13 December 2004, para.530. Article 25(3) of the Rome Statute, which provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person...(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission [and]...(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. In the latter situation the contribution has to be intentional and either be made with the aim of furthering the criminal activity or criminal purpose of the group or be made in the knowledge of the intention of the group to commit the crime.

diamonds, in the knowledge that the Revolutionary United Front would use the weapons to commit war crimes and crimes against humanity.<sup>18</sup> Similarly, in the case of *Katanga* at the International Criminal Court (ICC) the Court found that the supply of weapons by the defendant militia leader to another militia group in the Bogoro massacre in the Democratic Republic of Congo amounted to a significant contribution with knowledge that the other militia group would use such weapons to attack a civilian population, i.e. commit a war crime.<sup>19</sup> On the basis of this conviction Mr Katanga is currently facing reparation proceedings regarding victims of the massacre.

9. The ICC is investigating the individual criminal responsibility of leaders of the Gaddafi regime. The ICC has sent cooperation requests to the Libyan Government and to other States asking them to identify, freeze and seize assets belonging to the Gaddafi and al-Senussi families for the purposes of reparations.<sup>20</sup> Although Colonel Gaddafi, his son Saif and brother-in-law al-Senussi were indicted by the ICC and had their assets frozen, the death of Gaddafi and the trial of the other two alleged perpetrators by domestic Libyan courts has precluded the ICC from offering any avenue for redress. The ICC can only order reparations against a convicted person.<sup>21</sup> Moreover, the jurisdiction of the Court only commenced from 1 July 2002, therefore outside the time period during which the IRA carried out its attacks. However establishing al-Senussi's or Gaddafi's responsibility in domestic proceedings could subsequently help to support findings of State responsibility before international arbitrators or courts.

### Reparations options

10. Reparations as a measure of accountability can help to publicly acknowledge the suffering of victims and the responsibility of the wrongful party. Reparations can embrace a range of measures including restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition. Although there may be difficulties in getting compensation from the Libyan Government by accessing frozen assets (discussed below), other forms of reparation may be important. Measures of satisfaction are meant to repair victims' moral harm by officially acknowledging their suffering and affirming their dignity. Such measures include acknowledgement of responsibility, apologies, investigations of those responsible and memorials. These measures may be key for some IRA victims who would thereby achieve some form of accountability and information on the level of collusion between the Libyan Government and the IRA.

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<sup>18</sup> *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-A, 26 September 2013. Despite a UN Security Council Resolution Liberia has yet to pass legislation allowing the seizure of Taylor's assets: see the final report of the Panel of Experts on Liberia submitted pursuant to paragraph 5(f) of UN Security Council resolution 2079 (2012), S/2013/683, 25 November 2013, para.55-57.

<sup>19</sup> *Prosecutor v Germain Katanga*, Judgment pursuant to Article 74 of the Rome Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014.

<sup>20</sup> Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 2 November 2011, para.13.

<sup>21</sup> Article 75(2), Rome Statute.

11. Although Gaddafi is dead, there are some suggestions that Abdullah al-Senussi, former head of Libyan intelligence would have information on the IRA shipments or could be held responsible for those shipments. In the Lockerbie case the UK and US Governments demanded that the Libyan Government: ‘Surrender for trial all those charged with the crime and accept complete responsibility for the actions of Libyan officials. Disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers. Pay appropriate compensation.’<sup>22</sup>
12. It may be very difficult to establish the responsibility of the Libyan State for IRA attacks without that State’s cooperation. Reparation programmes are often constructed on the basis of political negotiations to redress the suffering of victims. There are exceptional cases, such as the Iraq-Kuwait UN Claims Commission, which was established by the UN Security Council to deal with claims arising from the First Gulf War and using Iraq’s oil revenue. But in the Libyan case it would be much more difficult to determine the responsibility of various actors, and alleged victims, wherever they suffered their injuries or bereavements, would need to refer to a wide variety of acts committed by the Libyan Government and militias.<sup>23</sup> There are assets of the Gaddafi regime that could be used in a Claims Commission, but this would need to be established by the UN Security Council, rather than by the UK Government using assets it has already seized from the Libyan regime.

### **Use of the frozen assets of the Gaddafi family**

13. UN Security Resolution 1970(2011), besides referring the Libyan situation to be investigated by the ICC, also stipulated that UN member states should freeze all assets owned by the identified members of the Gaddafi family.<sup>24</sup> Some four years on there remain difficulties in identifying those assets.<sup>25</sup> Countries where assets are likely to be, such as South Africa, Niger or Uganda, do not have legislation to facilitate UN requests for the seizure of assets. Even if assets can be identified, such as those claimed by Italy,<sup>26</sup> the UNSC Resolution 1970(2011) stipulates that such identified frozen assets will be ‘made available to and for the benefit of the people of the Libyan Arab Jamahiriya’.<sup>27</sup> Reparations for IRA victims would need

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<sup>22</sup> Statement issued by the British Government on 27 November 1991, A/46/826 S/23307 Annex III.

<sup>23</sup> See Conor McCarthy, ‘What Happens to the Frozen Fortune? The Libya Situation and Claims for Reparation’ (2011) *European Human Rights Law Review* 3.

<sup>24</sup> Para.17, S/RES/1970 (2011) and S/RES/1973 (2011), para.19. Article 6, EU Council Decision 2011/137/CFSP, 28 February 2011.

<sup>25</sup> Final report of the Panel of Experts in accordance with paragraph 13 (d) of resolution 2144 (2014), 23 February 2015, S/2015/128, Annexes 35-36 Annexes 35-36 [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2015/128](http://www.un.org/ga/search/view_doc.asp?symbol=S/2015/128)

<sup>26</sup> Statement to the UN Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 2 November 2011, para.13.

<sup>27</sup> Ibid, para.18.



to come out of assets that were seized assets prior to the passing of the resolution on 26 February 2011.<sup>28</sup> There is some state practice of using perpetrators' assets to fund reparation programmes. Some \$225 million of former President Marcos's assets seized in Swiss bank accounts is currently the source for reparations for victims of human rights violations in the Philippines.<sup>29</sup> In Colombia the assets of paramilitaries convicted before criminal courts have also been used to support a reparations fund for victims.<sup>30</sup> If IRA victims were to claim reparations against seized Libyan assets it may be unacceptable to allow those claims to take priority over claims submitted by persons who were more direct victims of the Gaddafi regime.

## Conclusion

14. We would welcome the Libyan and UK Governments agreeing to arrange a fund, similar to the Lockerbie one, which would provide a pot out of which reparations could be paid to victims of the Troubles in Northern Ireland. However, while the IRA has been identified as causing the most deaths during those Troubles, other actors, including the British and Irish governments, as well as other republican and loyalist groups, were responsible for committing or colluding in the deaths and serious injury of many hundreds of victims in and beyond Northern Ireland. We therefore believe that any Reparations Fund should be inclusive, so that one group of victims are not given special treatment vis-à-vis other victims of the Troubles, and other responsible actors contribute to such a fund.
15. There are also other forms of symbolic reparation beyond compensation. A memorial to all victims of the Troubles, including those killed and seriously injured could be built out of any Reparation Fund, or a museum to publicly document the harm caused and those responsible. In particular we would call for further statements of apology and acknowledgements of responsibility from the Libyan Government. We would also call upon the UK government to use all possible diplomatic channels to facilitate the gathering of relevant information about the transportation of arms to the IRA by former officials of the Gaddafi regime who are still alive. This could provide an important avenue for accountability in identifying those responsible and to acknowledge their responsibility to prevent repetition in the future. Compensation can be an important means to acknowledge victims' suffering and alleviate their daily

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<sup>28</sup> Ibid, para.19(c).

<sup>29</sup> s.7, Act Providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes, Republic Act No. 10368, 25 February 2013.

<sup>30</sup> Between 2005-2008, 4,619 items of property were donated by combatants to victims for the purpose of reparations, ranging from TVs and cars to apartments in Belize: National report submitted in accordance with paragraph 15(A) of the Annex to the Human Rights Council Resolution 5/1 - Colombia, A/HRC/WG.6/3/COL/1, 19 September 2008, para.52. Restitution of law is provided through the Ley de Víctimas y Restitución de Tierras, Law 1448. In 2012 reparations were provided to 153,013 victims: National report submitted in accordance with paragraph 5 of the Annex to Human Rights Council Resolution 16/21 - Colombia, A/HRC/WG.6/16/COL/1, 7 February 2013, para.91.

suffering, but other forms of reparations, such as acknowledgements of responsibility, can help to publicly recognise the truth of the past and those responsible.